No. 72-1061

Supreme Court of the United States

October Term, 1973

WINDWARD SHIPPING (LONDON) LIMITED, ET AL.,
Petitioners

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS,
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' REPLY TO THE SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS *Amicus Curiae*

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This reply to the supplemental memorandum for the United States as *amicus curiae* is filed pursuant to the Chief Justice's leave to respondents to file a response on or before December 14, 1973, granted in open court on December 4, 1973, during the oral argument in the above noted case. The procedural background is as follows:

The petitioners' brief, and the briefs of the amici supporting their position, were filed on or about August 15, 1973. Pursuant to an order of the Court, respondents' brief, and the brief of the amicus supporting their position, were filed on September 28, 1973.

On November 28, 1973, the United States filed its supplemental memorandum supporting the petitioners' position. (That memorandum is "supplemental," since, when this case was pending on a petition for a writ of certiorari, the United States, had, on May 11, 1973, and in response to an order of this Court, filed a memorandum in support of the respondents' position. The supplemental memorandum indicates that the National Labor Relations Board and the Department of Labor continue to take the Government's original position, while the State Department supports the present view. Supp. Mem. pp. 1-2, 12 n.2.)

Despite Rule 42 (2) & (4) of the Rules of this Court which read together appear to require that a brief *amicus curiae* "for the United States sponsored by the Solicitor General" may be filed "only after an order of the Court or when * * * presented within the time allowed for the filing of the brief of the parties supported," the supplemental memorandum was not accompanied by a motion for leave to file out of time or by any statement of reasons as to why that memorandum was tendered 105 days after its due date and 6 days before oral argument. On November 30, 1973 the Clerk advised the undersigned that the appropriate course for respondents if they objected to the filing of the supplemental memorandum was to bring the matter to the Court's attention during oral argument and to request that it be struck or that in the alternative respondents be given an opportunity to respond. This was done and the Court reserved action on the motion to strike, and pending consideration of that request, granted permission to file this reply.

ARGUMENT

1. The supplemental memorandum quotes this Court's statement in *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 18, that the "boundaries" of the National Labor Relations Act include "only the working men of our own country." Supp. Mem. p. 9. It acknowledges that as a general proposition peaceful primary non-recognitional area-standards picketing within the United States by American workers covered by the Act is protected by § 7, citing *Houston Bldg. & Const. Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321; *Int'l. Longshoremen's Association, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195. Supp. Mem. p. 6. Its statement of the case demonstrates that the picketing here was by American seamen acting through their unions and that the picketing met the standards set out in the *Claude Everett* case in every particular. Supp. Mem. pp. 3-6. Moreover, the supplemental memorandum points to nothing in the language or legislative history of the NLRA to support the conclusion that Congress intended § 7 to have a narrower range of application to picketing by American seamen than by other employees governed by federal labor law.

Thus, under established principles, the analytic framework of the supplemental memorandum leads to the conclusion that federal law and not the law of Texas governs here. See *Teamsters Union* v. *Morton*, 377 U.S. 252, 259-260. That, indeed, was the conclusion the Government reached in its original memorandum. Congress has not acted in the interim. Nor has this Court spoken to this subject since then. In order to further foreign relations objectives, the supplemental memorandum, however, now concludes that state

law is controlling. That conclusion will not withstand analysis—as we now demonstrate.

2(a). The supplemental memorandum begins its retreat from the generally applicable principles noted above by summarizing the decisions in *Ariadne, McCulloch, Incres Steamship Co.* v. *Maritime Workers*, 372 U.S. 24, and *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, and concluding, properly, that "the test of the applicability of the Act to maritime labor disputes is whether the assertion of jurisdiction 'would necessitate inquiry into the 'internal discipline and order' of a foreign vessel.' " Supp. Mem. pp. 7-10.

This summary is incomplete only in its omission of the critical decision of this Court which draws the line between the recognitional activity undertaken in *McCulloch, Incres* and *Benz*, which does "necessitate inquiry into the 'internal discipline and order' of a foreign vessel," and is for that reason outside the protective ambit of the NLRA, and non-recognitional area—standards picketing which this Court has characterized as an incident of a "domestic" labor dispute. The decisive point, as Mr. Justice Black stated in *Marine Cooks and Stewards* v. *Panama S.S. Co.*, 362 U.S. 365, 371 n. 12:

> "Unlike the situation in the *Benz* case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the foreign employees as in *Benz*. Though the employer here was foreign, the dispute was domestic."

The line drawn in *Marine Cooks* is, of course, precisely parallel to that recognized in *Claude Everett* as marking the outer boundary of protected activity in labor disputes such as these. This serves to preserve parity under the law between American seamen and the other classes of workers covered by the Act, and between foreign flag vessels and other employees. See the Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in this case at pp. 3-15.

(b) The Supplemental Memorandum seeks to obliterate this line by arguing that:

> "Taking the unions at their words, the immediate objective of the picketing must have been to force the foreign-flag vessels to pay higher wages and benefits to their alien crewmen than were required by their foreign articles, or negotiated by their foreign unions." Supp. Mem. p. 11.

This misstates the record. That objective as stated on the handbills distributed by the pickets was to have those who saw their message "Patronize American Flag Vessels, Save Our Jobs, Help Our Economy And Support Our National Defense By Helping To Create A Strong American Merchant Marine." Supp. Mem. p. 4. The supplemental memorandum cites no evidence for its characterization of the union's immediate objective and there is none. The Government therefore falls back to the argument that in *Benz, McCulloch* and *Incres,* no less than in *Marine Cooks* and the instant case, the "long-range objective" of the picketing was to preserve American job opportunities. Supp. Mem. p. 11. But the lesson of *Marine Cooks* is that where the picketing's immediate objective, as well as its long-range

objective, is limited to the preservation of the job opportunities of American seamen and does not cross over to "seeking to represent or organize the foreign seamen employed on foreign flag ships [*McCulloch* and *Incres*], nor • • • seeking to help them in a dispute which they have with their employer [*Benz*]," it is protected by federal law 'because it does "not involve the ships' 'internal discipline and order'." Cf. Supp. Mem. p. 10.

3. In apparent recognition that its gambit in attempting to redefine the nature of the objective of this picketing is doomed to failure, the supplemental memorandum then attempts to sweep all the chessmen from the table:

> "In *Ariadne*, the Court reiterated and summarized the concern which has underlain each of the decisions in this area: that the Court not construe the NLRA so as possibly to jeopardize the foreign relations of the United States without a clear directive from Congress." Supp. Mem. p. 13

The succeeding quotation makes it plain that *Ariadne* announces no such principle. That decision emphasizes that *Benz, McCulloch* and *Incres* precluded "Assertion of jurisdiction by the Board over labor relations already governed by foreign law." 397 U.S. at 199. But foreign law does not govern this dispute. Indeed, the limitless principle announced by the Government is without support in reason as well as precedent. Every longshoreman's strike, to use only the most obvious example, can be said to "possibly • • • jeopardize the foreign relations of the United States." For such strikes have a far more pervasive effect on the movement of maritime commerce between nations than the picketing here. This is equally true of strikes at American

airports, at American manufacturers who export, at American retailers who import. Congress has recognized all this and has nevertheless opted for a labor policy which includes the right to strike and picket "at its core." *Bus Employees v. Missouri*, 374 U.S. 74, 81. As the Board stated in an early leading case, "Although the Board does not have jurisdiction over foreign manufacturers as such, it does have jurisdiction over unfair labor practices occurring in this country and affecting foreign commerce." *Washington-Oregon Shingle Weavers Council*, 101 NLRB 1159, 1161. And as this Court's decision in *Ariadne* demonstrates, it is equally well settled that the Act also governs "protected activity" affecting foreign commerce. See also e.g. *Moore Dry Dock Co.*, 92 NLRB 547.

Continuing in the same vein, the supplemental memorandum states:

> "Finally to be considered is whether Congress, in the National Labor Relations Act, intended to protect an activity which could have substantial adverse effects on our economy and foreign trade." Supp. Mem. p. 15.

That question has long ago been answered in the affirmative. Congress has understood the magnitude of the power to strike. It has restricted that power as it has seen fit but it has been circumspect in doing so. And this Court has recognized in numerous instances that this circumspection is not a ground for the application of state law. As Chief Justice Vinson stated in overturning the Wisconsin Public Utility Anti-Strike Law:

> "We have recently examined the extent to which Congress has regulated peaceful strikes for higher

wages in industries affecting commerce. International Union of United Auto Workers v. O'Brien, 339 US 454, (1950). We noted that Congress, in § 7 of the National Labor Relations Act of [July 5] 1935, as amended by the Labor Management Relations Act of [June 23] 1947, expressly safeguarded for employees in such industries the 'right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection, 'e.g., to strike.' We also listed the qualifications and regulations which Congress itself has imposed upon its guarantee of the right to strike, including requirements that notice be given prior to any strike upon termination of a contract, prohibitions on strikes for certain objectives declared unlawful by Congress, and special procedures for certain strikes which might create national emergencies. Upon review of these federal legislative provisions, we held, 339 US at 457:

'None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation.' " *Amalgamated Association of Streetcar Employees* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 389-390; footnotes omitted.

CONCLUSION

For the reasons stated above as well as those stated in the respondents' main brief, the judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas should be affirmed.

Respectfully submitted,

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